United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6150

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—v.—

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES,
Defendants-Appellants,

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' AND MASON BUILDERS ASSOCIATION, CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS,
Defendants,

and

JOSEPH ERSKINE and LAWRENCE MORRISON,
Appellants.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :

Plaintiff-Appellee,

vs. :

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES, : 76-6150

Defendants-Appellants, :

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' and MASON BUILDERS ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, CONTRACTING PLASTERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS, :

Defendants, :

and

JOSEPH ERSKINE and LAWRENCE MORRISON, :

Appellants.

----------X

DEFENDANT'S, THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. REPLY BRIEF

PRELIMINARY STATEMENT

Defendant, the General Contractors Association of New

York, Inc. ("GCA") (incorrectly throughout this action being designated in the caption as General Contractors Association of New York City) hereby replies to the arguments of Equal Employment Opportunity Commission ("EEOC") contained in the EEOC Memorandum of Law (Memorandum) filed with this Court, on December 6, 1976. GCA's response is structured in such a way so as to respond to the arguments contained in Plaintiff's Memorandum and the Point Captions hereinafter stated are set forth as they appear in the EEOC Memorandum.

THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC. - REPLY

"III. GCA WAS PROPERLY JOINED AS A PARTY DEFENDANT FOR PURPOSES OF RELIEF ONLY, UNDER RULE 19(a), F.R. Civ. P."

The GCA has no collective bargaining agreements with Locals 14 and 15, 15A, 15C or 15D. The GCA is not a contractor and/or employer within the issues before this Court.

Here there is nothing in the Record to support a conclusion that GCA controls employment or that GCA established uniform employment practices. Further, the collective bargaining agreements with the union are not between GCA and the union but are between members of GCA and the union (See for example, Joint Appendix, Volume II' Exhibits (p. 121), (p. 133), (p. 149) and not all GCA members are parties to all such agreements. Simply

put GCA is not a party to the collective bargaining agreement. If an employer member should breach such agreement, the cause of action should be against the employer, not GCA. Thus, since GCA is not an employer and not a party to the collective bargaining agreements, it is not a proper or necessary party for the purposes of relief. Indeed, Appellee appears to concede this (Appellee's Memorandum p. 54) on stating that "maybe the relief could have been granted without the presence of GCA".

The EEOC's conclusion that the "...Members of GCA have granted complete authority to GCA to establish that the Union's uniform employment practices, affecting their work including those at issue in this case" is not established anywhere in the Record before this Court. It is simply a conclusion reached by the EEOC without any evidence in support thereof.

It is most difficult to follow the logic of the EEOC presentation appearing on page 54 of its Memorandum, where the EEOC vacillates between the designation of GCA as a necessary party for the purpose of complete relief only, under Rule 19(a) F. R. Civ. P., and immediately thereafter following on the same page 54, again the recital that a possibility existed that relief could have been granted without the presence of GCA in the action.

Further on page 55, paragraph marked "2", GCA is again depicted by the EEOC as a proper party for the purposes of relief rather than its individual members. In said paragraph of EEOC's Memorandum, there is the concession by the EEOC, that there was no attempt in the action to hold any employer liable for a substantive violation. Such a statement is probably the basis for the Plaintiff's intentional exclusion of employers as parties to the action. In addition, there was no claim of liability against the GCA in EEOC's Complaint and, in the stipulation set forth in the Pre-Trial Order, it is recited, the Plaintiff's Complaint "does not assert any claim for liability against defendant

General Contractors Association of New York, Inc."
See Joint Appendix, Volume I: Pleadings p. 43 therein).

Also stated in the first paragraph of this Item "2" is that the relief sought herein affected only matters within the authority delegated to GCA. Again, this is a conclusion gratuitously made by the EEOC without any evidence in support thereof in the Record before this Court. In fact nowhere in the Record before this Court is there any evidence of authority bestowed on the GCA by its members.

Having on pages 54 and 55 designated the GCA as a necessary party to the action for complete relief under Rule 19(a), the EEOC on page 56 of its Memorandum, then designates the GCA, not as a party, but as an agent of the Members of the GCA.

Moreover, the recital on page 56, in EEOC's concluding paragraph of its "Point III", alleges the GCA was full competent to represent its Members, with respect to the issues herein dealing with collective bargaining agreements. This, again is a gratuitous utterance with no evidence in the Record before this

Court to support such a statement.

Reference in the same paragraph is also made to the GCA making its views known at the District Court level. (Defendant GCA has been informed by EEOC counsel that EEOC's statement in parenthesis "Statement, supra at 20 is incorred" and that the number should correctly be "21", specifically, the second paragraph therein.) The facts are GCA was not afforded a hearing to make its views known, with respect to the EEOC relief entitlement, at the District Court level, notwithstanding the statement appearing on page 21 of the EEOC brief. That there was no such hearing, this Court has but to look at the extent of the transcript of the proceedings before the District Court on July 26, 1976, which commences on page 128 of the Joint Appendix, Volume I" Pleadings and continues thereafter through page 203 therein. This is a total of 76 pages, 58 for the morning session and 18 for the afternoon session. Further, the Court will note therein that while the District Court solicited comment from all present at the outset of the meeting, the District Court changed its position as the meeting progressed and directed comment letters be written to the Court, within a week following the meeting, in lieu of comment at the July 26, 1976 meeting.

The extent of the transcript and the comment letters (See Joint Appendix, Volume I: Pleadings, Letters from Mr. Brady to Judge Tenney, page 204; from Mr. O'Hara to Judge Tenney, page 208 and Fr. Mr. Gallagher to Judge Tenney, page 216) can hardly be asserted as evidence of and establishing that there was an extensive argument. Also there should be noted, in the same transcript of the July 26, 1976 hearing, supra, before the District Court, on page 202 thereof, Mr. Gallagher, counsel for the GCA stated, in substance, that the GCA's appearance at the July 26, 1976 meeting of the District Court, was not intended to be a waiver of any rights that GCA had to question such meeting as being an appropriate method of resolving the issue of Relief, which issue was never tried before the District Court.

In addition in the letter of July 30, 1976, supra, from the law firm of Shea Gould Climenko & Casey (Counsel for GCA over the signature of James J. A. Gallagher, a member of the firm therein, addressed to the District Court Judge (Joint

Appendix Volume I, Pleadings, pages 216 through 220) the following appears on the bottom of page 219, running over to the top of page 220, "Further, on behalf of GCA, the Court is advised that by submission of this letter to the Court and its participation at the July 26, 1976 conference for the purposes of reviewing the Proposed Order, the GCA does not intend to waive, nor shall it be deemed to have waived any rights GCA has had and or shall have, the challenge the propriety of the method of determining the relief to which the Government is entitled in lieu of a hearing for such purposes."

On page 56 of its Memorandum the EEOC once more makes a gratuitous observation without evidence in support thereof, viz. that the GCA on this appeal is continuing actively to represent and protect the individual interests of the GCA Members. Again, referring to the letter of July 30, 1976 from Shea Gould Climenko & Casey, supra, over the signature of James J. A. Gallagher, more specifically page 219, the second paragraph therein reads as follows: "Reference hereinab ove by the undersigned to the contractor members of GCA, is not intended to be deemed a course of conduct where the contractor members of GCA are participating herein in any way.

It is true as recited in EEOC's brief (Page 56, last paragraph of Point III therein) no employer has sought to intervene in this case to protect its individual interest. This statement, however, is answered by the EEOC's own Memorandum on page 55, Paragraph "2" therein, which narrates: "There was no attempt in this action to hold any employer liable for a substantive violation. The relief sought affected only matters within the authority delegated to GCA.": Once more, this Court's attention is directed to the uncontroverted fact there is no evidence in the Record of what authority is delegated to the GCA. In the GCA Memorandum of Law, Point II therein, in support of its appeal, the attention of this Court is directed to the fact that the Members of the GCA were never made parties to the action and again respectfully submits to this Court, that the District Court lacked any jurisdiciton to issue an Order binding upon the Employer-Members of the GCA.

As was cited in the GCA's main Memorandum of Law (Point I therein, Pages, 11, 12, 13 and 14) in support of its appeal, there is but one reference to the GCA in the 32 page Order of the District Court. Said reference appears in Paragraph numbered 4 of the Final Order and Judgment (See Joint Appendix,

Volume I: Pleadings - pages 239, et seq.). Said Paragraph provides for a permanent injunction against the GCA and its members not to act alone and/or in concert with others to the end discrimination in employment practices is effected, even though no such charge was made against the GCA in Plaintiff's Complaint and GCA's Members-Contractors-Employers, were not parties to the action. That there was no claim of liability against the GCA is confirmed by the Pre-Trial Order, (Joint Appendix - Volume I: Pleadings, page 43). Of significance also, is the last sentence of said Paragraph 4 of the Final Order and Judgment, supra, which is a recital that said Paragraph does not constitute a finding by the District Court, that the GCA and its members have in the past engaged in prohibited discriminatory acts or practices described therein.

On the other hand, when the Final Order and Judgment, supra, is reviewed to ascertain the extent to which the Order is applicable to the members of the GCA, it is uncontrovertible that the following Paragraphs therein, are not directed against the GCA but against its members; (20), (24), (31), (34(a)), (37(a)) and (b), (38), (39(b)), (44(a)), (46), (48), (56(a)) and (c) and (59).

How then can the EEOC reasonably support the last sentence of its Point III, Page 56 of its Memorandum which sets forth "The joinder of the GCA for the purposes of relief and the non-joinder of the employer-members was therefore proper?" How can there be any attempt to join, for any purpose, the Contractor-Employer-Members, when the EEOC on page 55 Paragraph "2" of its Memorandum admits "There was no attempt in this action to hold any employer liable for a substantive violation. The relief sought affected only matters within the authority delegated to GCA"?

EEOC, by its footnote 52 - Page 54 of its Memorandum cites Kaplan v. Iatse, 525 F.2d at 1361 n. 4 and United States v. Sheet Metal Workers, Local 36, 416 F.2d at 132 n. 16 in support of its statement, "While it may be that relief could have been granted without the presence of GCA. . ."

Note 4 appearing in the Kaplan v. Iatse case, Page 1361 therein, is applicable to the District Court having

authority to order non-enforcement of discriminatory provisions of a collective bargaining agreement even in the absence of a signatory employer. Said Note 4 cites the U.S. v. Sheet Metal Workers, Local 36, in support thereof.

There is no finding by the District Court, in this action of discriminatory provisions in the collective bargaining agreements between the Unions and the Contractor member of employers of the GCA. The rationale of Note 4 to the Kaplan v. Iatse case has no application herein.

As to Note 16 appearing on Page 132 of the U.S. v. Sheet Metal Workers, Local 36, it reads, in part, as follows:

> "16. We recognize that the Employers with whom the Locals have collective bargaining agreements are not parties to this lawsuit and that the employers' agreement will be necessary

> if modifications to the collective bargaining agreements is to be made. . .In the light of this record, we assume that an agreement with the employers, which will meet the conditions laid by this opinion, can be met. If no new agreement is possible, the union must nonetheless discontinue those practices which have been found to be in violation of Title VII by this Court."

While said Note 16 is cited by the EEOC to support its contention, on Page 54 of the EEOC Memorandum, that relief might have been granted without the presence of GCA, (thereby being contra to EEOC's assertions, GCA is a proper party for the purposes of relief only pursuant to Rule 19(a) F.Civ.P.) the Note does establish that where employers are not parties to the action and there exist collective bargaining agreements between the Locals and the employers, the consent of the employers is necessary if modifications are to be made to the collective bargaining agreements.

The EEOC in its Memorandum, in the last paragraph on Page 54, continuing over through Page 55, alleges that even if the "government" had not joined the GCA for relief, the District Court would have authority to join the GCA if necessary for relief. In support of its position, EEOC cites United States v. Chesapeake & Ohio Railway Co. 471 F.2d 582, 592-93, Cert. denied 411 U.S. 939 (1973) and Bing v. Roadway Express, Inc. 485 F.2d 441, 445 (5th Cir. 1973).

United States v. Chesapeake & Ohio Railway Co. is a case where a local union sought to join the national unions as parties to the suit, the court declined to do so and stated that if it became necessary to add new parties to execute the decree, "the district court has ample authority to do so," citing Griffin v. County School Board, 377 U.S. 218, 234, 84 S.Ct. 1226, 12 L.Ed. 2d 256 (1964). In the Griffin case the original complaint challenged racial segregation in admittedly public schools. The amended complaint charged the County, after the action was commenced, of using its own funds and state funds to assist its private schools while shutting down public schools to avoid desegregation. The court decided Rule 15(d) F.R. Civ. P. permitted supplemental amendments to cover events happening after suit and persons participating in these new events could be added if necessary. Contrasting the facts herein to those in the Griffin case clearly evidence there is no factual similarity between the two cases and should not be considered by this Court in arriving at its decision herein.

Page 55 of the EEOC Memorandum, refers to United States v. Navajo Freight Lines, Inc., 525 F.2d 1318, 1321-22 (9th Cir. 1975) and Sagers v. Yellow Freight Systems, Inc., 529 F.2d 721, 737-738 (5th Cir. 1976) allegedly to support

the EEOC contention that where an International Union bears the responsibility of negotiating collective bargaining agreements on behalf of the Locals, the International Union is a proper defendant. No distinction is made in this part of the EEOC Memorandum whether the International Union is a proper party defendant for liability or relief. Apparently EEOC's intent is to create an analogy between the Navajo Freight Lines, Inc. and Sagers cases, supra, to the GCA position herein.

Again, as in the Steamfitters, Local 638 case, supra, the Sagers and Navajo Freight Lines, Inc. cases have as undisputed facts the obvious influence of the International Unions and the Teamsters with respect to the collective bargaining agreements of their respective Locals. (See Sagers v. Yellow Freight Systems, Inc., supra, last paragraph on Page 737 and United States v. Navajo Freight Lines, Inc., supra, Page 1321, last sentence appearing thereon, continuing through Page 1322.) Nowhere in the record before the court has plaintiff produced evidence to establish the GCA having like influence on its members and no analogy between said cases and the actions herein can reasonably be drawn.

As to the Bing v. Roadway Express, Inc. case, supra,

members were added to a class action. That the action was a class action, was determined for the first time at appeal level and was not determined at District Court level. After the determination that the action was a class action, the court then proceeded to add members to the class involved in the action. Again, the disparity of facts between the within action and the Bing case renders the decision therein be granted no consideration herein. This Bing case does not support the principal enunciated by the EEOC, that the District Court would have the right to join the GCA for relief if the government had not done so, when viewed in the light of the facts in this case and the facts in the Bing case.

In reference to U.S. v. Local 638 cited on p. 55 of the EEOC Brief, the factors relied upon by the Court in finding an employer association to be an employer and thus a proper party defendant were that the association controlled employment, established uniform employment practices, and conducted the negotiations for the employer members.

This Court's attention is directed top. 2 herein, the last paragraph appearing thereon and running over through page 3 as items that have been utilized to establish the evidence required to support a finding that a party is or is not a necessary party defendant. Such requirements are not present herein as being applicable to GCA and the conditions embrased in this Point are not supported by the U.S. against Local 638 case.

POINT OF CLARIFICATION

In the Joint Appendix, Volume I: Pleadings - Page 185 therein (which is a page of the transcript of the July 26, 1976 meeting with the District Judge) reference is made to Mr. Devorkin "informing Your Honor in the Local 28 case before Judge Werker we had the same situation with respect to defendant, General Contractors Association being only named as a party for relief, not as to liability.. . ." The reference to "General Contractors Association" is in error if intended to designate the General Contractors Association of New York, Inc. as a party therein. The records of said action will establish that the General Contractors Association of New York, Inc. was never a party therein - See EEOC et ano. v. Local 638, et al. 71 Civ. 2877 (HFW).

"IV. THE PROCEDURE PRECEDING ENTRY OF THE DECREE ADEQUATELY PROTECTED THE RIGHTS OF GCA."

The simple fact is that GCA was never accorded a hearing as to the relief and remedies herein provided in the Order and Judgment herein appealed from.

The fact that there was a sixteen day trial as to liability is not responsive to GCA's claim that it was denied a hearing since no liability was charged against GCA and GCA was therefore excused from such trial reserving its right however to a hearing on the issue of relief.

Appellee appears to argue in the alternative (a) GCA was accorded a hearing at the meeting of July 26, 1976 or (b) GCA is not entitled to such a hearing. We will consider these contentions seriatim.

(a) The Meeting of July 26, 1976 - The transcript of this meeting (App. I 128-203) indicated there were 76 pages of discussion, 58 of which occurred at the morning session and 18 in the afternoon session - The presiding Judge while he did solicit comments of those present as to Plaintiff's proposed Order in the early stage of the discussion, ultimately allowed no comment from the mid-point of the morning session and no comment

at all concerning the proposed Order in the afternoon session. At the conclusion of the afternoon session (18 pages of transcript), the District Court then stated that if any comments with respect to the proposed Order were desired, they should be made in letter form to be delivered to him within a week. The GCA at the July 26, 1976 meeting at the District Court took issue with the propriety of the method of determining relief and repeated the same position in the letter of its counsel to the Distirct Court Judge dated July 30, 1976. (Joint Appendix, Volume I: Pleadings, pp. 216 - 220). Further, at this meeting of July 26, 1976, the District Court indicated the need for a hearing (See GCA Main Brief, pp. 32-33). This meeting was not a hearing on the issue of relief or remedy, for GCA was never accorded a hearing on the implementation of the mandated hiring hall, specifically, as to procedures to insure the referral of competent, experienced and qualified personnel.

(b) The Appellee's conclusion that GCA is not entitled

to a hearing as Appellee urges that GCA was joined as a party "only to give it the opportunity to present its views as to the propriety of the relief to be ordered as redressed for the violations of Title VII proved at the trial." (Appellee Memorandum, p. 5). However, the Complaint of Plaintiff herein does not support such a contention. This Court is directed to the Joint Appendix, Volume I, Pleadings, Page 11 therein which recites in part as follows:

"14. The defendant Contractors Association are joined herein as defendants for the purposes of relief according to Rule 19(a) of the Federal Rules of Civil Procedure." F. R. 19 (a) Civ. P. states in part (1) "in his absence, complete relief cannot be accorded among those already parties". It is Section 19 (a) (1) that the Plaintiff has repeatedly recited as being the basis for the inclusion of the contractors association in this action. Therefore, the Record does not support the Appellee's contention that the only reason the GCA was a party, was to allow it to present its views as to the propriety of the relief to be ordered. Rather, it was to assure, allegedly, by its presence in the action, total relief and not to afford the GCA an opportunity to pass upon the propriety of the relief. Therefore, Appellee's

reliance on EEOC v. MacMillan Ploedel Containers, Inc. 503 F. 2d 1086 is misplaced and inapplicable herein.

Further Appellee is mistaken in thinking GCA seeks a hearing as the "need for relief" (Appellee Brief p. 57). This is not the basis under which GCA seeks a hearing. Rather GCA sought a hearing as to its legitimate concerns in the implementation of the relief particularly the safety aspects of the operation of its costly equipment, as affecting the public, the operator and the fellow workmen.

The decision in U. S. v. Wood relied upon by Appellee (Brief p. 58) is not applicable here. There the union was afforded a full opportunity to be heard where here, the Record establishes the GCA was not accorded such an opportunity.

In addition to the above safety aspect, this Court's attention is directed to the fact that the Final Order, Joint Appendix, Volume I: Pleadings, Paragraph No. 32 (a) therein appearing on page 253 sets forth the establishment of eligibility for the individuals seeking employment under the jurisdiction of the Union. In paragraph 32 (b) appearing on page 255, Joint Appendix, Volume I: Pleadings, there is a recital, in substance, which recites

that the qualifications set forth in 32 (a) may be expanded "by the Administrator upon application of the Unions or any employee." Further, in the same Paragraph 32 (b), it recites qualifications should be based upon..."passage of a test pursuant to Paragraph 46 of this Order."

The Paragraph 46 referred to above, recites in part "46. The Unions shall submit for the Administrator's approval a proposal for administration of a personal test for each type of machinery within the Union's direct jurisdiction which tests shall be validated pursuant to E.E.O.C. guidelines. . . ."

Paragraph 32 b and 46 of the final Order are significantly devoid of any participation by the GCA and/or its members, in determining qualifications of individuals to operate costly and dangerous equipment. Notwithstanding the Members of the GCA would be the owners of the equipment, the GCA and its Members are deprived of any opportunity to participate in the determination of when and how it is to be determined an individual is qualified to operate equipment owned by the members of the GCA. No supporting evidence for such provisions was ever supplied to the GCA.

While the members of the GCA are most affected by the above provisions of the Order, since it is the operation of their equipment which is thereby concerned, the public has also to be considered when the operation of such equipment is visualized in the urban enviornment of the geographical jurisdiction of the Locals 14 and 15.

The last paragraph of "A" appearing on page 59 of the EEOC Memorandum, while it may be reciting words that appear in the Final Order as to modification of the decree that any party can recommend changes to the Administrator and appeal to the District Court if it is unsatisfied with the Administrator's decision, it is the position of GCA that the generality of language which is being referred to on said page 59 is overriden by the specific language set forth in paragraphs 32 (b) and 46 of the Final Order.

Again, in the last Paragraph of Item "A" of this EEOC point, in the last sentence appearing on page 59, the EEOC appears to be asserting that extensive information was developed at the trial to support the decree. Inasmuch as the trial was for liability only and the decree deals with relief, GCA submits to this Court that the said last sentence of "A" is merely a self-serving recital with no support by way of evidence in the Record before this Court.

In "B" of this Point appearing on page 59, the EEOC recites at the outset as follows: "GCA also claims that, since it was a party for the purpose of relief only and not for liability, the decree improperly imposes upon its members the affirmative obligation to use the hiring hall as ordered by the decree. This is not correct. GCA claims in Point III "the provision of the

Final Order and Judgment, supra, requiring the establishment of a hiring hall is improper and constitutes an abuse of discretion on the following grounds:

(a) The remedy of a "hiring hall" constitutes the addition of a substantive provision to existing collective bargaining agreements between the Unions and the GCA Members-Employers-Contractors.

(b) The contractors, signatories to such collective bargaining agreements are not parties in this action.

(c) The contractors, members of GCA, were thereby deprived of their constitutional and contractual rights without being accorded a hearing.

Further with respect to "B", the assertion by EEOC that the Employers who know of the Decree cannot, without risking contempt undertake to violate it. The position of the GCA is that the Decree is not binding upon its Members who were not parties to the action. The imposition of a hiring hall on the members of the GCA is not valid since it is properly an item of negotiation between the members of GCA and the Unions and not to be foisted upon the parties to the Collectibe Bargaining Agreement by the Court (See, H. K. Porter v. NLRB 397 U.S. 99) The GCA employer members not being parties to the action, are not bound by the Order and no evidence exists in the Record to give the District Court the right to bind the GCA employer contractors

notwithstanding they were not parties to the action. Therefore, the Order directly and/or indirectly is not binding upon such contractor-employers.

If there is a finding that the District Court lacked jurisdiction over the GCA Contractor-Employer Members, the Order must fail. It cannot then be revived indirectly by making any aspect of such order binding upon the Contractor-Employer-Members of GCA. Rather, it would merely be a clarification that the Order never was applicable to the GCA Employer-Members and notwithstanding the fact that such members may have had notice of the order, they are free to continue the hiring practices they followed prior to the Final Order and Judgment.

In the EEOC-International Longshoremen's Ass'n., case cited on page 59, it states that employers who were not named in the decree could properly be cited for contempt on the basis that such employers had acted in concert with a union, or alone, in frustrating the Court's decree. The EEOC Memorandum then proceeds to recite: "If the direction for assignment of work only through the hiring hall is appropriate relief (as we have shown it was) then it is equally appropriate that parties, joined for the purpose of effectuating relief, be made aware of their obligations with respect to that relief." In the quoted language, the EEOC appears

to be saying that the Members of the GCA were joined in the action for the purpose of effectuating relief and should be made aware of their obligation with respect to that relief. The record establishes that the members of the GCA were never in the action and are not bound thereby. While the GCA was made a party therein for the purposes of complete relief, the GCA is not an Employer and has no reason to have any dealings with the hiring hall.

"II. THE RELIEF ORDERED BY THE DISTRICT COURT WAS APPROPRIATE FOR THE VIOLATIONS FOUND."

A. REFERRAL PRACTICES

GCA in its main brief (Point III) contended that the mandate of a hiring hall constitutes the imposition of a new substantive provision upon existing collective bargaining agreements and was therefore an impermissible departure from established Federal Labor Policy.

Appellee in its Memorandum (pp. 38-43) states that courts have the power to modify provisions of a collective bargaining agreement which perpetuate past discrimintion. The cases relied upon by Appellee largely deal with a modification of seniority provisions. Such modIfications are in accord with established Federal Labor Policy. Franks v. Bowman Transportation Co., 47 L. Ed. 2d 444.

Herein however, we are not dealing with seniority modification but the addition of a new substantive provision to the collective bargaining agreement. The proper form of relief in such circumstances should be to defer initially to the collective bargaining process to permit the union and the employer to work out the contractual modification or addition with the Court retaining jurisdiction to approve the outcome of such

negotiations. United States v. Sheet Metal Workers Local 36, 416 F. 2d 123, 132; Title VII, Seniority Discrimination and The Incumbent Negro, 80 Harv. L. Rev. 1260.

It is one thing for a court to order non-enforcement of discriminatory provisions of a collective bargaining agreement and quite another to order the inclusion of a new substantive provision.

Further, the members of GCA (and not GCA) are the parties to the collective bargaining agreements and are not parties to this action. Thus the same question is raised as was raised in GCA's main brief, pp. 26-27, may a court unilaterlly modify or add a provision to a collective bargaining agreement where the party to such agreement where the party to such agreement is not a party to the action.

Appellee failed in its brief to respond to this question. Its reluctance to respond is understandable for we would submit that since the District Court did not have jurisdiction over the employers, such modification of or addition to the collective bargaining contracts could be accomplished only by the employers agreeing to it. U.S. v. Sheet Metal Workers Local 36 supra p. 132 n16.

Respectfully submitted,

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